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Held at the Palais Wilson, Geneva, on Thursday, 24 May 2018, at 10 a.m.

Chair: Mr. Huhle (Vice-Chair)

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Mr. Huhle (Vice-Chair) took the Chair.

The meeting was called to order at 10 a.m.

Consideration of reports of States parties to the Convention (*continued*)

Initial report of Austria (*continued*) (CED/C/AUT/1; CED/C/AUT/Q/1 and CED/C/AUT/Q/1/Add.1)

1. *At the invitation of the Chair, the delegation of Austria took places at the Committee table.*

2. **Mr. Figallo Rivadeneyra** (Country Rapporteur), noting that the State party had been confronted in autumn 2015 with an unprecedented influx of refugees and migrants, many of whom had belonged to vulnerable groups, such as unaccompanied minors, said that the Committee would like to know whether the amendment to the Asylum Act adopted in that context was compatible with the principle of non-refoulement.

3. The effectiveness of the State party's implementation of the Dublin Regulation, which established the criteria and mechanisms for determining which State was responsible for examining an asylum application, was of key importance, and a large number of shortcomings still needed to be addressed. He requested additional information regarding the criteria and mechanisms that were currently in place in the State party to assess the risk of enforced disappearance and risks to persons' lives and security in the context of extradition or deportation procedures. He also wished to know whether the safeguards provided through such assessments had been addressed in the proposed amendments to the legislation that were currently being discussed in the Austrian Parliament.

4. He asked whether persons taken into custody were automatically entitled to have prompt access to legal counsel, regardless of the circumstances leading to detention, for instance in cases of flagrante delicto, and whether detainees without financial means were immediately granted access to free legal aid. According to paragraph 59 of the replies to the list of issues (CED/C/AUT/Q/1/Add.1), a court decision was required in such circumstances and that procedure could presumably take some time.

5. According to paragraph 61 of the replies, only a couple of complaints had been filed concerning delays or failure by officials to record a deprivation of liberty. He asked what action was taken against officials responsible for such negligence. It seemed that the planned mandatory training modules in the area of fundamental rights for future judges, public prosecutors and prison staff did not cover enforced disappearance; he therefore wished to know whether specific training courses would be developed on the rights enshrined in the Convention.

6. **Ms. Janina** (Country Rapporteur) said that the definition of a victim in article 24 of the Convention included not only a disappeared person but also any person who had suffered harm as a result of an enforced disappearance. Under section 65 (1) (a) of the State party's Code of Criminal Procedure, a victim was defined as any person who was exposed, through a deliberately perpetrated criminal act, to violence, intimidation or other forms of moral or material damage. The word "deliberately" implied that *mens rea* was an element of the offence. As that did not constitute an element of the offence of enforced disappearance, she wished to know whether the definition restricted the scope of the protection afforded to victims. Section 65 (1) (c) of the Code included in the definition of a victim any other person who could have suffered damage as a result of the offence. She wished to know whether "damage" referred only to physical harm and whether a victim of enforced disappearance could be covered by the provision.

7. Article 24 of the Convention also provided for the right of victims to obtain reparation and compensation. She asked whether the State party's legislation covered all forms of reparation, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition. She also enquired about concrete steps taken to ensure that victims received prompt, fair and adequate compensation.

8. Referring to paragraph 79 of the replies to the list of issues, she requested clarification of the link between criminal court proceedings and civil claims for

compensation. How could a victim request compensation that was prompt, fair and adequate? She also wished to know what type of assistance could be provided to the families of persons who were missing as a result of an alleged act of enforced disappearance. In particular, given the influx of asylum seekers, mostly from conflict situations, she would like to hear whether the State party had identified families who were victims of enforced disappearance as defined in the Convention, for instance, where family members had disappeared. What kind of psychological or financial support was provided in such cases?

9. The State party had failed to include a specific provision in its legislation reflecting article 25 of the Convention concerning the situation of child victims of enforced disappearance. Mention was made in paragraph 89 of the replies to the list of issues of sections 302, 195, 223, 224 and 229 of the Criminal Code, but the protection provided in those sections did not cover enforced disappearances.

10. Referring to cases of adoption of children that had originated in an enforced disappearance, she asked whether such adoptions could be annulled under the State party's legislation. Lastly, she requested information on measures taken to ensure that the best interests of children and their right to express their views were taken into account.

11. **Ms. Kolaković-Bojović** asked whether the training courses for judges and public prosecutors were provided prior to appointment or as in-service training and if they included training on the Convention. Paragraph 132 of the report referred to the possibility for victims to claim compensation under the Civil Code. She asked whether they could present such claims in criminal proceedings, requesting the competent judge to rule on the type or amount of compensation. She also wished to know whether they could obtain urgent compensation or assistance from a special compensation fund.

The meeting was suspended at 10.25 a.m. and resumed at 10.45 a.m.

12. **Mr. Ruscher** (Austria) said that every application for asylum in Austria was placed on record. The application was filed with an official body such as the police force and then, following a brief round of questions, for instance regarding the person's origin and whether offences such as trafficking were involved, the application was forwarded to the Federal Office for Immigration and Asylum for further consideration.

13. The Convention relating to the Status of Refugees, including its article 33 concerning the prohibition of expulsion or refoulement and article 31 concerning protective measures on behalf of refugees who entered the country unlawfully, was enshrined in domestic legislation. In addition, article 3 of the European Convention on Human Rights, which prohibited inhuman and degrading treatment, had acquired constitutional status in Austria. Complaints could thus be referred to the Constitutional Court and ultimately to the European Court of Human Rights.

14. If an official failed to register an asylum seeker and to forward the application to the competent authority, punitive action could be taken. Disciplinary measures could be adopted or proceedings might be instituted for abuse of authority. Sanctions could include dismissal from the official's post.

15. With regard to detainees' right to legal assistance, all persons arrested by the police were entitled to communicate without delay with a private person of confidence and, if they had no lawyer, to phone the legal counsel service, which was accessible at all times. Additional legal assistance during police custody was not automatically available but would be provided as soon as judicial proceedings were instituted. Access to a legal expert was guaranteed virtually throughout the asylum procedure and was mandatory for unaccompanied minors. An unaccompanied minor could not be questioned without the presence of a legal representative. Asylum seekers could contact the Office of the United Nations High Commissioner for Refugees (UNHCR) at any time and UNHCR could also contact asylum seekers and consult their files.

16. Employees of the Federal Office for Immigration and Asylum were required to undertake specific training in the form of seminars conducted mostly by external experts. Police officers, meanwhile, had to complete a two-year mandatory basic course before they could begin duty. The training, which included a theoretical and a practical component, had

been changed extensively in 2017 to make human rights a cross-cutting issue rather than the topic of a stand-alone module, as had previously been the case. Training programmes for police middle managers had also been adapted to incorporate a human rights focus, and trainers had been schooled in human rights and pedagogical methods.

17. The Government had learned a lot during the height of the European migrant crisis in 2015 and had accordingly decided to expand the capacity of the national asylum authorities. The total number of staff members had been increased from 500 to around 1,500. It was expected to take six months for the new recruits to be sufficiently trained.

18. Paragraph 24 of the Code of Police Practice placed an obligation on law enforcement officials to investigate the whereabouts of missing persons and to take appropriate measures in the case of persons considered to be a danger to themselves or others. A centralized system was used to coordinate the police response to missing person reports. Trained psychologists and psychotherapists were on hand to assist first responders in dealing with trauma victims, including victims of enforced disappearance.

19. **Ms. Pampalk-Lorbeer** (Austria) said that a public official who failed to report or provide information on an ongoing case of enforced disappearance could be charged under chapter II of the Criminal Code with participation in the offence through concealment of the disappeared person's whereabouts or through aiding and abetting in the form of encouragement or endorsement. If the criminal conduct had ceased, and the official had learned about it only after the fact, he or she could still be charged with abuse of official authority, which carried a maximum penalty of 5 years' imprisonment. There were specific provisions in the Criminal Code addressing the liability of superiors who failed to report cases of enforced disappearance that constituted a crime against humanity.

20. Regulations on the use of force by law enforcement officials were being revised in response to a study conducted by the University of Vienna into police brutality. In 2016, the prosecution authorities had received almost 500 complaints of police brutality, around 20 of which had led to the bringing of formal charges. The majority of the complaints had related to the use of handcuffs or pepper spray. The authorities also had a duty to investigate allegations of mistreatment by prison officials. There had been 66 such complaints in 2016.

21. The European Arrest Warrant was a simplified cross-border judicial surrender procedure used for the purpose of prosecuting or executing a custodial sentence or detention order. A warrant issued by one European Union country's judicial authority was valid in the entire territory of the European Union. The Warrant had been operational since 1 January 2004 and had replaced the lengthy extradition procedures that used to exist between European Union countries. Among the advantages of the Warrant were that it set a strict time limit for the country receiving a request to make a final decision on execution and that, for 32 categories of offences, including deprivation of liberty and, by extension, enforced disappearance, there was no need for a double criminality check.

22. "Extradition asylum" was a concept associated with article 13 (7) of the Convention and was granted pursuant to section 19 (3) of the Extradition and Mutual Assistance Act in cases where there was reason to suspect that the person to be extradited would be subjected to prosecution in the requesting State because of his or her origin, race, religion, affiliation to a specific ethnic or social group, nationality or political opinions, or could expect other serious prejudices for any of those reasons. Extradition requests might also be rejected if the criminal proceedings in the requesting State would not or did not comply with articles 3 or 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, or if the punishment to be handed down would be enforced in a manner that was not consistent with article 3. The Extradition and Mutual Assistance Act provided the basis for all extraditions, including to States that had not ratified the International Convention for the Protection of All Persons from Enforced Disappearance. For an extradition request to be valid, it had to concern a crime that carried a maximum penalty of at least 1 year's imprisonment. The Government had done its part to combat enforced disappearance by ratifying the International Convention; it was incumbent on non-ratifying States to provide the necessary cooperation in that regard.

23. As to the complaint of attempted enforced disappearance in Iraq in 2015 that had fallen under Austrian jurisdiction because both the alleged perpetrator and the alleged

victim had been residing in Austria at the time of the complaint, the Government had not submitted a request to Iraq for mutual legal assistance. The case had been investigated by the Regional Office for the Protection of the Constitution and the Fight against Terrorism and had been closed owing to a lack of evidence. A second investigation had been launched, and promptly closed, after the complainant had been accused of providing false testimony.

24. The legal counsel service, available 24 hours a day, which had been introduced at the beginning of 2017, had been used 1,650 times in its first year. If a detainee did not have the means to pay for representation, the costs were borne by the Ministry of Justice, which was currently spending in the region of €80,000 a month on lawyers' fees. The eligibility of a detainee for free legal aid was determined by a court. All detainees with foreign citizenship were entitled to contact their country's consulate immediately.

25. Judges and prosecutors in Austria were required to hold a law degree and to have undergone at least four years of additional, postgraduate training. Courses dealt in detail with human rights issues, including deprivation of liberty. Although there was no specific module on enforced disappearance, legal provisions on the offence were studied thoroughly. Prison officials too received basic and advanced training on human rights and international law, although there was no specific training on the Convention.

26. Section 5 of the Criminal Code enshrined the principle of *dolus eventualis*, according to which, to prove criminal intent, it was sufficient to demonstrate that the accused had foreseen the possibility of his or her conduct breaking the law and had persisted regardless of the consequences. That principle, which applied to the crime of enforced disappearance, therefore established a low threshold for proving intent.

27. The word "damage" in section 65 (1) (c) of the Code of Criminal Procedure covered any and all material and immaterial damages resulting from the commission of a crime, including physical and psychological pain and suffering. Victims in criminal proceedings had the right to claim compensation and to free legal aid if necessary. Victims under section 65 (1) (a) and (b) of the Code were also entitled to psychological assistance. Police officers and prosecutors had a duty to inform all victims of their rights.

28. To obviate the need for victims to claim compensation through civil lawsuits, judges who handed down criminal convictions were required to stipulate the amount of compensation owed by offenders to their victims. In the event of an acquittal, a victim had to go through civil channels in order to claim compensation. Should the judge not be in a position to set an amount, she or he could refer the case to the appropriate civil court. In addition, victims of an intentional offence punishable by a prison sentence of at least 6 months — thus including enforced disappearance — also had access to other types of assistance, including rehabilitation, therapy and additional financial assistance, through the Ministry of Social Affairs. Lastly, as set out in paragraph 89 of the State party's replies, the Austrian Criminal Code was fully in line with article 25 of the Convention.

29. **Ms. Walser** (Austria), responding to questions about the electronically managed Integrated Administration of the Penitentiary System, said that prison officials were responsible for entering all relevant information about a person deprived of her or his liberty, and a photo was also saved in the inmate's file. New prison officials were immediately given training on how to use the system. According to an internal regulation, dating back to 2000, when the system had first been set up, if new inmates arrived during the night shift, when there were fewer officers on duty, they could be registered the next day; although that regulation was still in force, new arrivals were usually registered immediately, even during the night shift. The complaint that had been received concerning improper registration concerned an officer who, having registered an inmate upon arrival, then searched the files for private information on the person, which was clearly an abuse of office and therefore unlawful.

30. Under civil law, if the consent of a parent to adoption had been obtained by fraud or threat, or if the child's well-being was at risk, the adoption could be annulled. Children had the right to be heard in person and could participate in legal proceedings depending on their age: provision was made for children between the ages of 10 and 16 years to speak with expert witnesses and a psychologist; for children younger than 10, a child welfare worker

was often involved and would be the judge of whether participation in the proceedings would negatively affect the child.

31. **Mr. Figallo Rivadeneyra** said that the State party had clearly taken a number of measures aimed at preventing the return of a person to another State where there were substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. However, legislation alone was not sufficient; such preventive measures must be applied in practice. He welcomed the positive practices of the State party in terms of the provision of legal defence and assistance. As for the registration of persons deprived of their liberty, he wished to point out that, while there could be many banal reasons for failure to register a new inmate, such failure could, in some cases, be linked to a risk of enforced disappearance. It was therefore important to continue monitoring such registration.

32. **Ms. Janina** said that she would like further information about the list of countries of origin considered as "safe" under Austrian law in an asylum procedure, including how persons from those countries were protected against the risk of enforced disappearance and whether they had the right to appeal a decision rejecting their application for asylum. In addition, she wondered how the fact that relatives of a person deprived of her or his liberty, but who were not legal representatives of that person, had no right to inspect the prison files could be considered consistent with article 18 of the Convention.

33. Turning to article 24 of the Convention, she said that it would be interesting to learn whether there was a State fund for compensating victims of crimes committed by State officials, if the official specifically convicted of such a crime was not in a position to pay compensation directly and immediately to the victim. She would welcome more detailed information about the Integrated Administration of the Penitentiary System, including which authorities were responsible for gathering information from all the prisons, how secure the system was, and whether all the information provided for in article 17 of the Convention was contained in the system. Lastly, the Committee would be grateful for the translation of the articles mentioned by the delegation regarding the fulfilment of the rights of children under article 25 of the Convention.

34. **Mr. Ayat** said that he would be interested to learn how the State party sought to insure against abuses in cases of involuntary hospitalization of mentally ill persons; specifically, it would be useful to know whether such hospitalization must necessarily be ordered by a judge and how it was monitored once in place. He would also welcome further information on the specific circumstances under which hospitalization beyond the three-month maximum period could be extended.

35. Commending the State party for the "Babynest" initiative designed for pregnant women in emergency situations, he said he would like to know how long children could remain in the care of a given youth welfare organization and under what conditions a child could be returned to her or his biological mother or, alternatively, put up for adoption.

36. **Mr. Ruscher** (Austria), responding to a request for statistical data on asylum seekers, said that approximately 28,000 asylum applications had been received and processed in 2014, with the number rising to 88,300 in 2015 before falling to 42,300 in 2016 and to 24,300 in 2017. The figures for 2017 were not yet definitive as a final decision had yet to be taken in some cases and some asylum applications had since been withdrawn.

37. A person subject to extradition who believed the principle non-refoulement to have been violated could appeal or request a judicial review of the decision prior to the measure being implemented or, failing that, upon arrival in the requesting State. It was likewise unlawful for a police officer to refuse or to fail to act on a request from a third-country national for assistance in obtaining international protection or in applying for asylum. Such conduct normally triggered disciplinary proceedings and the offending officer could be sentenced to up to 5 years in prison and lose his or her job and right to a retirement pension as a result.

38. Despite there being a list of countries of origin considered to be "safe", due consideration was still given to asylum applications submitted by nationals of those countries. However, in such cases, the authorities would, in all likelihood, conclude that the

person would not face persecution in his or her country of origin upon return there. Asylum seekers from "safe" countries were routinely interviewed about their reasons for having left their country of origin and for having travelled to Austria. If their asylum application was refused, they could of course appeal or request a judicial review of the decision. However, if the courts decided not to grant the appeal with suspensive effect, they would most likely have to await the final decision outside Austria.

39. The right of family members to be informed of a relative's arrest was guaranteed through the meticulous recording of the relevant details in an electronic database, which was accessible to all law enforcement officials. If an arrested person declined to contact his or her family and they subsequently reported him or her missing, the police would search for the person's name in the database and would easily be able to confirm that he or she was in police custody. Arresting and depriving offenders of their liberty was an integral part of police work and, provided that there were sufficient legal grounds for doing so, could not be considered to amount to enforced disappearance.

40. Although there was no dedicated compensation fund for persons who had suffered damages as a result of the abuse of authority by a public official, the Public Liability Act clearly provided that the State had an obligation to provide victims with adequate compensation and reparation on the public official's behalf. Public officials were not held individually liable for the payment of compensation as any inability to pay on their part would penalize the victim.

41. Persons suffering from a mental condition who were judged to be a danger to themselves and to others could be placed in a psychiatric clinic or hospital for treatment, provided that authorization was obtained from an expert physician. If confinement was deemed to be the most appropriate course of action, the courts were informed and a judicial review could be conducted to establish whether the measure was lawful and justifiable.

42. **Ms. Walser** (Austria) said that the details of persons under arrest, in pretrial detention and serving a prison sentence recorded in the electronic database also existed in hard copy, thus ensuring that the information remained accessible in the event of a system failure. The electronic database was maintained by the Austrian Federal Computing Centre, which adhered to the highest information security and data protection standards. Access to the electronic database, which also contained court rulings and physicians' notes, was restricted. For example, prison officers could only access information on inmates under their direct care.

43. Involuntary confinement could be imposed as a forensic measure, or as a penalty by virtue of a court decision. Persons could be confined to a hospital, a specialized medical institution or a special unit within a penal institution. The staff working in those institutions underwent mandatory training and were required to adhere to high standards of care. A pilot project to facilitate communication between inmates who did not speak adequate German and medical personnel, through the provision of remote interpretation services, had been launched in 2017 and had since been rolled out to a greater number of penal institutions. Confined persons could likewise speak to medical personnel through an interpreter via a video link.

44. **Ms. Pampalk-Lorbeer** (Austria) said that section 77 of the Code of Criminal Procedure provided that any person with a legitimate legal interest could enjoy full access to the records of investigation and trial proceedings, insofar as doing so did not conflict with overwhelming public or private interests. Certain documents could, however, be redacted if required.

45. In criminal proceedings, it fell to the individual perpetrator of the crime, who did not need to be a public official, to pay compensation to the victim. The delegation was not currently in a position to answer the question posed on the Babynest initiative and would submit a written response to the Committee within 48 hours.

46. **Ms. Janina** thanked the delegation for the fruitful and constructive dialogue and said that the Committee was grateful for the diligence that the State party had demonstrated in meeting its reporting obligations throughout the cycle and for its willingness to respond to the many questions posed by the members of the Committee. The State party was also to

be commended for having recognized the competence of the Committee to receive and consider communications under articles 31 and 32 of the Convention, despite no cases of enforced disappearance having been recorded in its national territory. She trusted that it would make every effort to disseminate the Convention and the Committee's concluding observations widely among all relevant stakeholders, particularly non-governmental organizations, legal associations and law enforcement agencies, and to involve civil society in any future initiatives relevant to the Convention.

47. **Mr. Tichy** (Austria) thanked the Committee for the enlightening dialogue. There was undoubtedly a need to raise awareness in the State party of the Convention and its relevance to Austria; to that end, a copy of the Committee's concluding observations would be distributed to the Human Rights Advisory Council and to those participating in the annual conference for international lawyers.

48. **The Chair** said that the importance that the State party attached to fulfilling its obligations under the Convention, despite no cases of enforced disappearance having been recorded in its national territory, and its willingness to submit to the Committee's scrutiny, were heartening. Its decision to ratify the Convention could set a much needed example to other countries in Europe, where the number of ratifications remained conspicuously low.

The meeting rose at 12.30 p.m.